

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS**  
**Stella B. Werner Council Office Building**  
**Rockville, Maryland 20850**  
**(240) 777-6660**

**IN THE MATTER OF:**

**ARDEN COURTS OF GERMANTOWN,  
MD, LLC**

Applicant

Bryan Palmer

Anita Irvin

Brian Donnelly

Stephen Crum

Dan Dokken

Anne (Nancy) Randall

Stuart Smith

For the Application

Heather Dlhopsky, Esquire

Matt Gordon, Esquire

Attorneys for the Applicant

\*\*\*\*\*

Pankaj Shukla

Matthew Jacob

Opposing the Application

Traci Scudder, Esquire

Attorney for Messrs. Shukla and  
Jacob<sup>1</sup>

\*\*\*\*\*

Before: Lynn A. Robeson, Hearing Examiner

OZAH Case No. 17-02

**HEARING EXAMINER'S REPORT AND DECISION**

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<sup>1</sup> Ms. Scudder entered her appearance on behalf of those opposing the application after the public hearing. Exhibit 62(a).

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## **I. STATEMENT OF THE CASE AND DESCRIPTION OF PROCEEDINGS**

On July 20, 2016, Arden Courts of Germantown MD, LLC (hereinafter “Applicant” or “Arden Courts”) filed an application seeking a conditional use to establish a Residential Care Facility for over 16 persons under §59-3.3.2.E.2.c of the Zoning Ordinance.<sup>2</sup> The application proposes a memory care facility with 64 beds and 44 parking spaces. The subject site consists of 3.02 acres and is part of a larger, unrecorded parcel of 3.62 acres, identified as Parcel 515 on Tax Map EU 31, with an address of 19115 Liberty Mill Road, Germantown, Maryland. It is zoned R-200 (Residential-Detached). Concurrent with its conditional use application, Arden Courts filed an application for a Preliminary Forest Conservation Plan (PFCP) and tree variance under Chapter 22A of the County Code. Exhibit 17.

Arden Courts filed a request to amend its application on September 12, 2016. Exhibit 37. By a notice dated September 14, 2016, the Office of Zoning and Administrative Hearings (OZAH) issued a Notice of Motion to Amend. OZAH received no objections to the amendment request. On October 11, 2016, OZAH noticed a public hearing for November 14, 2016. Exhibit 41. Shortly after, the Applicant filed a revised Landscape Plan and OZAH issued a second Notice of Motion to Amend. Exhibits 42. Once again, there were no objections. Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued its report recommending approval of the application subject to 10 conditions (Exhibit 44):

- 1) No more than 64 residents may reside at the facility.
- 2) The living units must not have full kitchens.
- 3) Physical improvements to the Subject Property are limited to those shown on the Conditional Use Site Plan, Landscaping Plan and Lighting Plan that are part of the submitted Application.
- 4) This approval is limited to no more than 35 employees on Site at any one time.
- 5) Employee arrival and departure times must be staggered so that fewer than 30 employees arrive and depart the site within any one hour.

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<sup>2</sup> All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, as amended.

- 6) The Applicant must satisfy the applicable transportation “policy area review” test at the time of preliminary plan review.
- 7) The Applicant must dedicate approximately 17 to 19 additional feet of right-of-way along Liberty Mill Road at the time of preliminary plan review.
- 8) The architecture of the building must be consistent with the architectural renderings submitted with the conditional use application, dated September 7, 2016.
- 9) Prior to the release of Use and Occupancy certificates the Applicant must meet all applicable Federal, State and County certificate, licensure, and regulatory requirements.
- 10) The Applicant must obtain approval of a Preliminary Plan of Subdivision per Chapter 50 of the Montgomery County Code.

The Planning Board recommended approval of the conditional use (with the conditions recommended by Staff) and approved the PFCP and tree variance. Exhibits 51, 58.

The public hearing on the conditional use application proceeded as scheduled on November 14, 2016. Six witnesses testified on behalf of the Applicant: Mr. Brian Palmer, Senior Project Manager of HCR Manor Care, Ms. Anita Irvin, Executive Director of Arden Courts at Fair Oaks, Brian Donnelly, an expert in landscape architecture, Stephen Crum, an expert in civil engineering, Dan Dokken, an expert in architecture, Anne (Nancy) Randall, an expert in transportation planning, and Stuart Smith, an expert in real estate evaluation. Their testimony is summarized in this Report where relevant. Mr. Pankaj Shukla and Mr. Matthew Jacob, who own properties abutting the subject property to the south, testified to express their concerns about the impact the facility may have on their properties. These concerns are summarized in Part II.E. of this Report.

In response to questions raised by Mr. Shukla and Mr. Jacob at the public hearing, the Hearing Examiner left the record open until December 9, 2016. By December 2, 2016, the Applicant was to provide (1) information on the type of muffler to be used for the generator, (2) legal argument on whether the sign proposed needed a variance, (3) information on whether exterior lighting could be dimmed by motion sensors, and (4) a proposed condition defining how employee shifts could avoid school drop-off and pick-up times. Exhibit 56. Mr. Shukla and Mr. Jacob were to advise whether they wished to cross-examine the Applicant’s expert in property

valuation (whose report was submitted for the first time at the public hearing) or whether they wished to submit written comments on the valuation report. The record was to close on December 9<sup>th</sup> so that each party could comment on the other's position. *Id.* The Hearing Examiner also requested the applicant to provide comments on the feasibility of (1) a board-on-board fence surrounding the driveway loop, (2) security fencing along the joint property line between the facility and the Shukla/Jacob properties, and (3) whether the proposed stormwater management outfall could be moved to the east of the Mr. Shukla's and Mr. Jacob's properties. Exhibit 57(b).

After the public hearing (on November 20, 2016), Mr. Shukla requested that the record remain open until December 23, 2016, in order to submit a report from his own expert in civil engineering on whether the stormwater management proposed would adversely impact his and Mr. Jacob's properties. Exhibit 59. He attached a "Transmittal for submitting documentation to DPS," that he had submitted to the Department of Permitting Services (DPS) in August, 2016. Exhibit 59(a). The transmittal contained questions about whether the stormwater management system proposed would adversely affect Mr. Shukla's property.

The Applicant opposed admission of an additional expert report because OZAH's Rules of Procedure require that these be identified in advance of the public hearing. The Applicant also pointed out that the adequacy of the stormwater management system would be studied in more detail during the subdivision process and consideration of the issue now would unduly delay this process. Exhibit 61.

Shortly afterward, an attorney for Mr. Shukla and Mr. Jacob, Ms. Traci Scudder, entered her appearance the case. Exhibit 62(a). She argued that both Messrs. Shukla and Jacob had raised their questions about stormwater management with representatives of the Applicant several times, and, according to them, the Applicant had not been entirely responsive to their questions. While

stormwater management would be revisited at the time of preliminary plan, addressing the issue now would eliminate the need for further negotiations at a later time. Messrs. Shukla and Jacob also requested a hearing to cross-examine Arden Court's property valuation expert. Exhibit 62.

The Hearing Examiner referred the questions regarding stormwater management to Staff. Exhibit 63(c). Staff responded on December 2, 2016. Their response forwarded comments from Mr. Mark Etheridge, Manager, Water Resources Section, DPS, the individual to whom Mr. Jacob's and Mr. Shukla's "transmittal" had been addressed. Planning Staff advised that they considered Mr. Etheridge's comments "conclusive" as to Staff's position because DPS is the lead agency for stormwater management. Exhibits 66, 67. Mr. Etheridge's preliminary review of the stormwater management concept determined that, "DPS did not see a demonstrated need to consider attenuation of larger storm events because off site conveyance appears to be adequate." Exhibit 66.

The Hearing Examiner declined Mr. Shukla's and Mr. Jacob's request to submit an expert report on stormwater management. Exhibit 68. The Zoning Ordinance authorizes the Hearing Examiner to extend the time for closing the record if she finds that additional information or government action is necessary on any relevant issue or a party requests a delay for good cause. *Zoning Ordinance*, §59-7.6.2.B.3.b. When a development requires approval of a preliminary plan, as this one does, the Zoning Ordinance vests the determination of whether stormwater is adequate in the Planning Board during that review process. Without any indication that the stormwater proposed would cause "undue harm" to neighboring properties (a question that is within the Hearing Examiner's jurisdiction), the adequacy of stormwater management must be left to the Planning Board, particularly as Mr. Shukla and Mr. Jacob had had ample time before OZAH's hearing to present a report from an independent expert. *Id.*, §§59-7.3.1.E.1.f; 59-7.3.1.E.1.g. On

December 9, 2016, the Hearing Examiner issued an order denying the request to submit an expert report on stormwater management and extending the close of the record to December 16, 2016, to permit the parties to submit the remainder of the information requested. Exhibit 71.

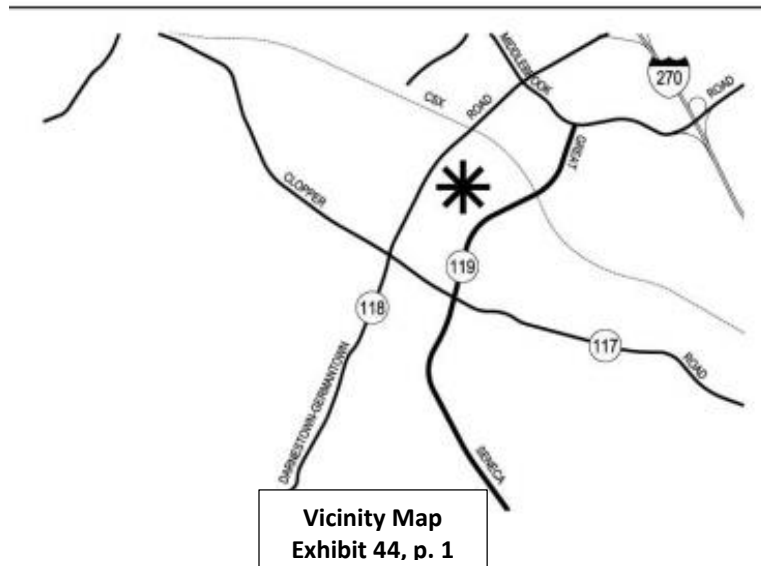
The parties timely completed their submissions and the record closed on December 16, 2016. Exhibits 72, 74. The Applicant's post-hearing submission included a revised site plan and landscape plan. These plans called for removal of an existing barbed wire fence along Messrs. Shukla and Jacob's properties to be replaced with 6-foot high chain link fence. Additional landscaping was added at the base of the fence and along the southeast corner of the parking lot. The Hearing Examiner referred these changes to Staff (as required by §59-7.3.1.D.3.b of the Zoning Ordinance). Staff commented on these changes on January 4, 2017, recommending some minor changes to the landscape plan. The Applicant submitted these changes on \_\_. The Hearing Examiner re-opened the record on January 6, 2017, to accept the revised landscape plan and correspondence among the parties. The record on the same date. Exhibit 79.

For the reasons that follow, the Hearing Examiner finds that the application meets all Zoning Ordinance requirements for approval of a conditional use for a residential care facility for over 16 persons, subject to the conditions of approval listed in Part IV of this Report.

## **II. FACTUAL BACKGROUND**

### **A. The Subject Property**

The site is located at the southeast corner of the intersection of Liberty Road and Dawson Farm Road. A vicinity map from the Staff Report (Exhibit 44, p. 1, on the following page) shows the property's general location.

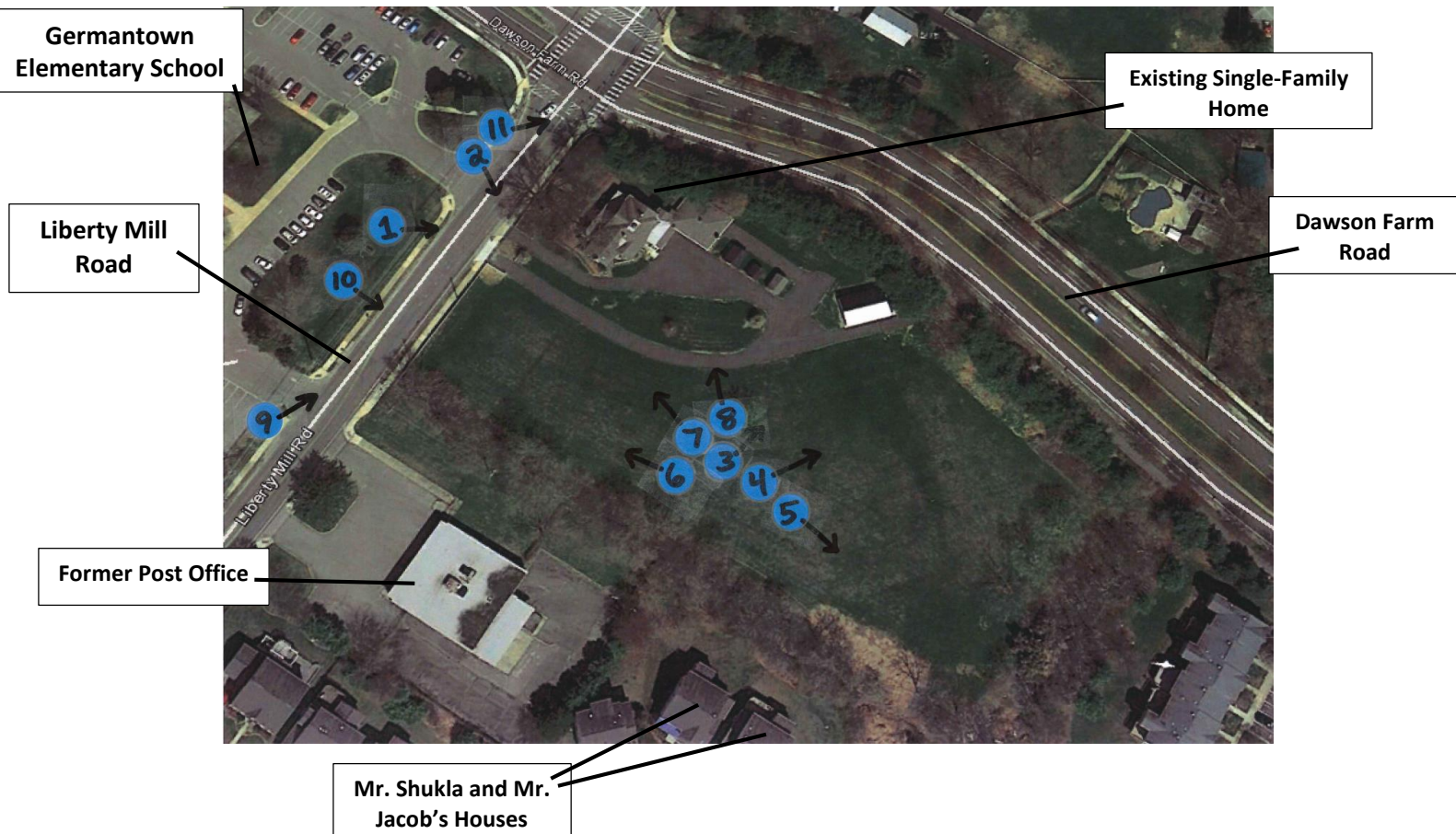


The property is a 3.02-acre portion of a larger parcel totaling 3.62 acres. The balance of the property will be reserved for an existing single-family detached home. Current site access is from a circular driveway with two aprons on Liberty Mill Road. Staff advises that Liberty Mill Road is a functional primary residential street with a 70-foot right of way. There is no access from Dawson Farm Road. Exhibit 44, p. 3.

The property has a 4% grade from the northeast corner to the southeast corner. Mr. Donnelly testified that this translates into a 23 or 24-foot downward slope from the northern part of the site to the southern property line. T. 70. Vegetation consists of a grass lawn with some trees on the perimeter. There are three specimen trees on the larger parcel. All are located on the portion of property that will remain with the single-family detached home after subdivision. The tree variance was required because construction would impact one of the critical root zones of a tree on the residual parcel. T. 71. Staff reports that there are no streams or wetlands on the site, although there is a small area of stream valley buffer in the southeast corner. *Id.*; T. 71. Of importance to this application, a 40-foot WSSC sewer easement (with a 30-inch main) runs through the buffer in that area. A 24-foot public storm drain easement also runs along the southern boundary, beginning approximately just



east of the mid-point of the property line to Liberty Mill Road. Exhibit 72(b). An aerial photograph of the property, submitted by the Applicant, is below (Exhibit 21(a)).<sup>3</sup>



### B. Surrounding Neighborhood

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Technical Staff and the Applicant agreed on the boundaries of the neighborhood: Germantown Road (MD 118) to the northwest, Accent Way and Fountain Hills Drive to the southwest, Great Seneca Highway to the southeast, and single-family detached properties located directly across Dawson Farm Road to the northeast. All properties within the

<sup>3</sup> The numbers shown on the aerial photograph key to photographs of particular views of the property. The Hearing Examiner finds it unnecessary to include these views in the Report.

defined neighborhood are zoned R-200. Staff describes the neighborhood as follows (Exhibit 44, pp. 4-5):

The nearest structures to the Site within the Neighborhood are the Fountain Hills townhouses to the southeast, two single-family detached homes to the south, a one-story vacant commercial building (former post office), to the southwest, and the Germantown Elementary School, directly across Liberty Mill Road, to the west. The rest of the neighborhood is primarily residential with a mix of two and three-story single-family detached houses and townhouses.

There is only one other approved conditional use (Special Exception No. S-2471) within the defined Neighborhood boundary. Special Exception No. S-2471 was approved by the Board of Appeals on June 18, 2008 and authorizes the construction and operation of a child day care facility with no more than 40 children on the property located at 19002 Mateney Hill Road. However, this child day care facility special exception was revoked by the Board of Appeals on September 25, 2013, and never implemented.

This “surrounding area,” as defined by both Staff and the Applicant, is shown on the aerial photograph (below) from the Applicant’s Land Planning Report (Exhibit 8):





The Applicant's expert in land planning, Mr. Donnelly, testified that, although all properties in the surrounding area are all zoned R-200, the subject property separates the residential uses to the east from the non-residential uses (i.e., the old post office and the school) to the west of the property. Mr. Donnelly opined that the use proposed offered an appropriate transition for these two parts of the surrounding area. T. 74.

### **C. Proposed Use**

The Applicant seeks a conditional use for a Residential Care Facility with 64 beds for memory care patients. The one-story facility will be 31,000 square feet with 44 surface parking spaces. The Applicant's Land Planning Report states that these facilities are needed in Montgomery County, as the aging population will increase more quickly than facilities can be available. An architectural view of the proposed development (Exhibit 37(d)) is shown below:



Mr. Palmer described the design concept and site selection for the facility. He testified that there is a large demand for memory care in this area of the County. The Applicant looks for locations that are adjacent to or within residential neighborhoods, so that family members do not have to travel long distances to visit residents. T. 19.

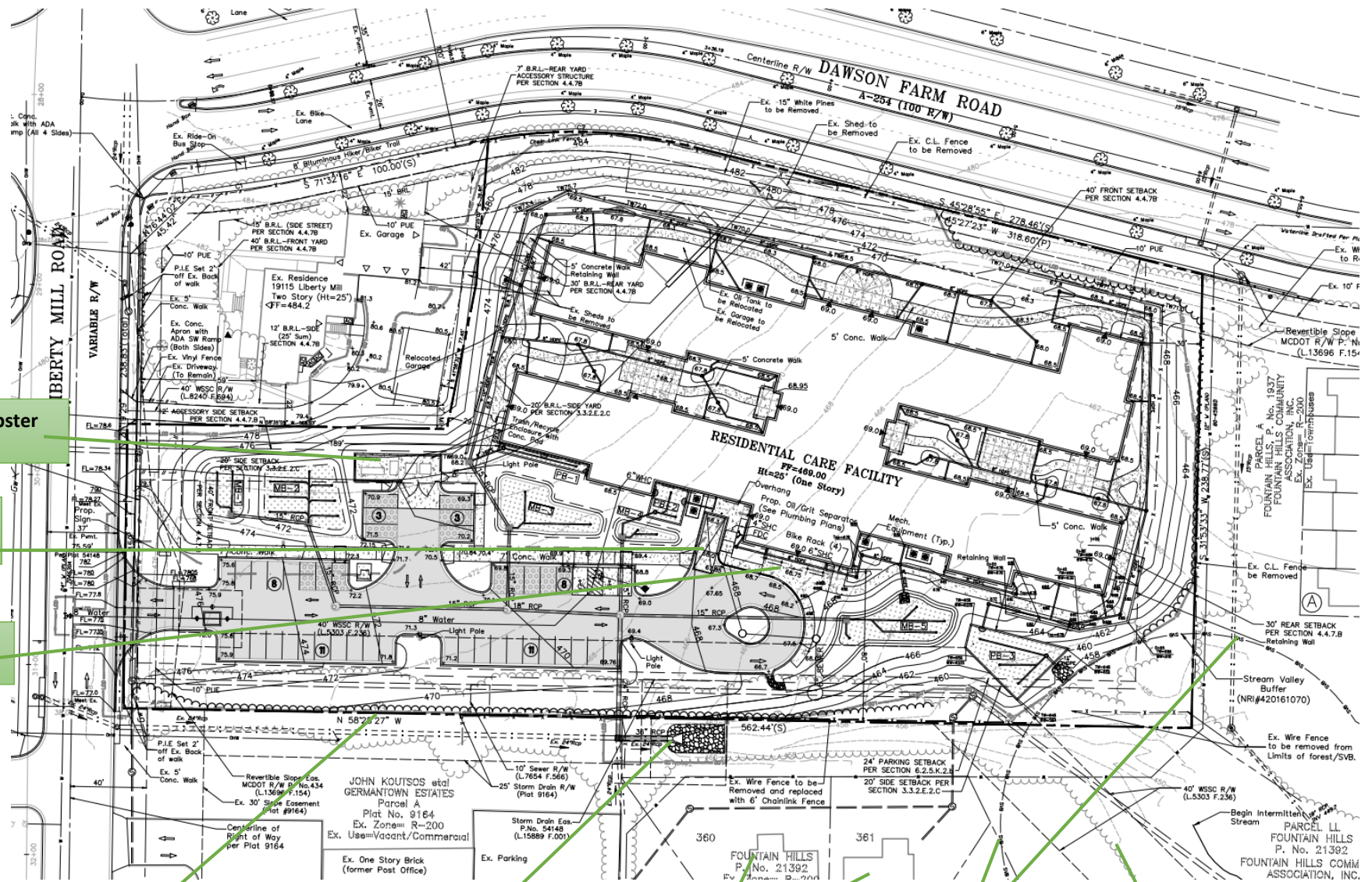
Due to its focus on memory care patients, the Applicant's goal is to create a site design where residents can circulate within and outside the building without encumbrance. Here, a secure courtyard surrounds the building on three sides, with multiple access points in each of the building's wings. The courtyard has various seating arrangements and patios where family members may visit with the resident. T. 18-20.

The building itself has several components. The main entrance, at the circular driveway on the south side of the building, opens to an administrative area. Access to the residential component is from a secure location behind the administrative area. The building has a central core and then four residential wings, or houses. T. 19. The central core, or commons, contains activity areas and other services, such as a post office, flower shop, and a "corner store." T. 22. Residents may circulate freely between the houses and the core. T. 22-23.

Each wing has 16 private bedrooms. These have only one room, a closet, and a half-bath. Each house has its own common dining area to which food is delivered from a single kitchen in the core area. In addition to the dining area, which are often used as meeting places, each wing has a "waiting room" that serves as a living room and is used for entertainment and a gathering place and a central bathroom. T. 22-24.

### **1. Conditional Use Site Plan**

Mr. Donnelly described the layout design of the conditional use site plan, a copy of which is shown on the following page. He testified that the surface parking is located on the western

Conditional Use Site Plan  
Exhibit 72(b)Generator/Dumpster  
AreaLoading/Turn  
Around SpaceBuilding  
EntranceStorm Drain  
EasementStorm Drain  
OutfallShukla/Jacob  
HousesBoundary of  
Stream Valley  
Buffer40-Foot WSSC  
Easement

portion of the site to minimize impacts from noise and lights on the abutting residential uses to the southeast and eastern sides of the site. T. 80-81. The northernmost existing driveway will be eliminated and the southern leg will remain approximately in its current configuration. A looped driveway provides a pick-up and drop-off point for residents and guests as well as service delivery trucks. Just west of the entrance, there is a loading space where delivery trucks may turn around. Exhibit 53; T. 75-76. Fire engines will use the driveway to approach the building and then may back up into the area provided for trash pick-up. The Applicant's fire access plan has been approved by the Fire Marshall. T. 75-76.

The pathway around three sides of the building and several exits from the building feed into the main court, which is located between the building wings. A sidewalk leads from the main entrance to a public sidewalk along Liberty Mill Road. T. 77.

The proposed driveway alignment will require a "Design Exception" from the Montgomery County Department of Transportation (MCDOT). Mr. Crum explained that MCDOT typically requires a 100-foot tangent between curb returns to ensure adequate sight distance. Due to proximity of other driveways on Liberty Mill Road, this standard requirement could not be met. The Applicant submitted an engineer's certificate that site distance will be adequate. Mr. Crum testified that the issue will be finalized at preliminary plan review. T. 130.

## **2. Site Landscaping, Screening, Lighting and Signage**

Staff reported that the Landscape Plan it reviewed met the requirements for minimum screening along the southern and eastern property lines. At the time of its report, Staff advised that the Landscape Plan included a buffer of at least 12 feet adjacent to Mr. Shukla's and Mr. Jacob's properties. Exhibit 44, p. 17. Mr. Donnelly testified that the Applicant did not extend the parking lot along to the Shukla/Jacob properties so Arden Courts could include additional

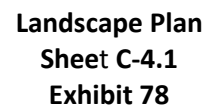


landscaping to increase compatibility. Screening in this area will include both elms and hackberries. These will be installed at 2-3 calipers and will grow to 40-50 feet at maturity (within 10 years). The landscaping in this area will have three tiers to mitigate the view of all levels of the building. They have also extended the landscaping further up the grade toward the building to maximize its effectiveness. T. 81-84.

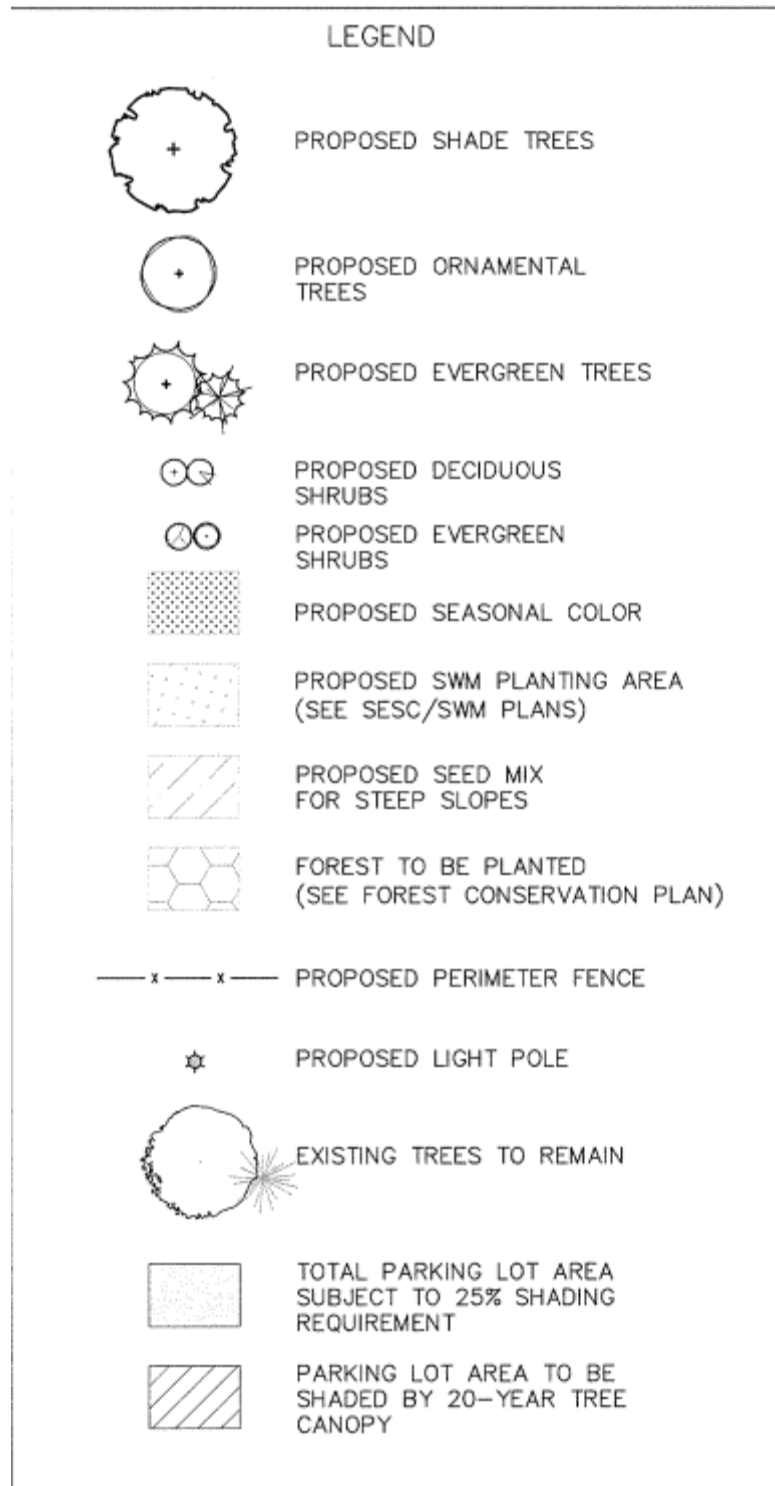
After the hearing, the Applicant submitted a revised landscape plan with additional plantings at the southern edge of the parking lot. According to the Applicant, this will form a part of the “continuous buffering to minimize views to the parking facility and any lighting impacts from vehicles and pole lights.” Exhibit 72, p. 6. A copy of the final Landscape Plan is shown on the following pages (Exhibit 78).

To address concerns about security raised by Mr. Shukla at the public hearing, the Applicant agreed to provide a 6-foot, 6-inch high black coated galvanized fence at the southern property line and to remove an existing barbed wire fence at this location, subject to the approval of the WSSC (which owns an easement along the property line) and the Maryland-National Capital Park and Planning Commission. The Applicant proposes to plant ground cover/climbing vines and Japanese Hydrangea Vine at the base of the fence. *Id.*

Staff reviewed the revised Landscape Plan and requested that a note requiring removal of an existing fence in the stream valley buffer be reinserted into the plan. Other than that note, Staff stated, “Staff is satisfied with the groundcover/climbing vines that has been added along the base of proposed 6-foot chain link fence on the southern boundary of the site, and with the landscaping that has been added along the southwest edge of the parking lot to provide additional screening.” Exhibit 78(a).







**Landscape Plan  
Sheet C-4.1  
Exhibit 78**

LANDSCAPE PLANT LIST								
Outside Fenced Area								
KEY	QTY	BOTANICAL NAME	COMMON NAME	CAL	HGT	SPD	ROOT	SPACING
<b>SHADE TREES</b>								
ASG	8	Acer saccharum 'Green Mountain'	Green Mountain Sugar Maple	2½ -3'			B&B	
CFS	6	Carpinus caroliniana 'Firespire'	Firespire Hornbeam	2½ -3'			B&B	
CXM	4	Celtis x 'Magnifica'	Magnifica Hackberry	2½ -3'			B&B	
LSR	2	Liquidambar styraciflua 'Rotundiloba'	Fruitless Sweetgum	2½ -3'			B&B	
NSF	3	Nyssa sylvatica 'NXSXF'	Forum Black Gum	2½ -3'			B&B	
QCO	7	Quercus coccinea	Scarlet Oak	2½ -3'			B&B	
QPR	3	Quercus prinus	Chestnut Oak	2½ -3'			B&B	
QRU	5	Quercus rubra	Red Oak	2½ -3'			B&B	
UAV	4	Ulmus americana 'Valley Forge'	Valley Forge Elm	2½ -3'			B&B	
<b>EVERGREEN TREES</b>								
CAT	3	Cedrus atlantica	Atlas Cedar		7-8'		B&B	
ICA	4	Ilex x 'Conaf'	Oak Leaf Red Holly		4-5'		B&B	
IOJ	10	Ilex opaca 'Jersey Princess'	Jersey Princess American Holly		5-6'		B&B	
IOK	2	Ilex opaca 'Jersey Knight'	Jersey Knight American Holly		5-6'		B&B	
PAB	8	Picea abies	Norway Spruce		9-10'		B&B	
PFV	7	Pinus flexilis 'Vanderwolf Pyramid'	Vanderwolf Pyramid Limber Pine		6-7'		B&B	
POR	7	Picea orientalis	Oriental Spruce		9-10'		B&B	
POS	1	Picea orientalis	Oriental Spruce		6-7'		B&B	
TOE	4	Thuja occidentalis 'Emerald'	Emerald Arborvitae		5-6'		Cont.	
TON	4	Thuja occidentalis 'Nigra'	Dark American Arborvitae		5-6'		Cont.	
<b>ORNAMENTAL TREES</b>								
ACT	8	Amelanchier canadensis 'Trazam'	Tradition Serviceberry		6-7'		B&B	
CCF	10	Cercis canadensis 'Forest Pansy'	Forest Pansy Eastern Redbud		7-8'		B&B	
CFA	6	Cornus florida 'Appalachian Spring'	Appalachian Spring Dogwood		6-7'		B&B	
MAN	5	Magnolia x 'Ann'	Ann Magnolia		6-7'		B&B	
MDA	1	Magnolia x 'Daybreak'	Daybreak Magnolia		7-8'		B&B	
MVH	6	Magnolia virginiana 'Henry Hicks'	Henry Hicks Sweetbay Magnolia		7-8'		B&B	
SRI	1	Syringa reticulata 'Ivory Silk'	Ivory Silk Tree Lilac		7-8'		B&B	
<b>DECIDUOUS SHRUBS</b>								
CAR	4	Clethra alnifolia 'Ruby Spice'	Ruby Spice Summersweet		24-30"		Cont.	48" o.c.
CFM	53	Cornus foemina 'Muskingum'	Muskingum Gray Dogwood		18-24"		Cont.	36" o.c.
DLC	28	Diervilla lonicera 'Copper'	Copper Dwarf Bush Honeysuckle		18-24"		Cont.	36" o.c.
IVL	16	Itea virginica 'Little Henry'	Little Henry Sweetspire		24-30"		Cont.	48" o.c.
SNS	11	Spiraea nipponica 'Snowmound'	Snowmound Spirea		24-30"		Cont.	36" o.c.
SPM	2	Syringa patula 'Miss Kim'	Miss Kim Lilac		3-4'		Cont.	60" o.c.
VAC	44	Viburnum acerifolium	Mapleleaf Viburnum		30-36"		Cont.	36" o.c.
VCA	6	Viburnum carlesii	Koreanspice Viburnum		30-36"		Cont.	60" o.c.
VCO	29	Vaccinium corymbosum	Highbush Blueberry		24-30"		Cont.	36" o.c.
VDR	38	Viburnum dentatum 'Ralph Senior'	Autumn Jazz Viburnum		30-36"		Cont.	60" o.c.
<b>EVERGREEN SHRUBS</b>								
ICH	6	Ilex crenata 'Helleri'	Helleri Japanese Holly		18-24"		Cont.	36" o.c.
IGD	37	Ilex glabra 'Densa'	Densa Inkberry		30-36"		Cont.	48" o.c.
IGN	53	Ilex glabra 'Chamzin'	Nordic Inkberry		18-24"		Cont.	36" o.c.
JVG	51	Juniperus virginiana 'Grey Owl'	Grey Owl Juniper			18-24"	Cont.	36" o.c.
MRE	16	Mahonia repens	Creeping Mahonia			18-24"	Cont.	36" o.c.
<b>GROUND COVER / CLIMBING VINES</b>								
PQU	8	Parthenocissus quinifolia	Virginia Creeper				#2 Cont.	As shown
SHY	9	Schizophragma hydrangeoides 'Moonlight'	Moonlight Japanese Hydrangea Vine				#2 Cont.	As shown

**Landscape Plan Plant List**  
**Sheet C-4.3**  
**Exhibit 72(d)**

LANDSCAPE PLANT LIST							
Inside Fenced Area							
KEY	QTY	BOTANICAL NAME	COMMON NAME	CAL	HGT	ROOT	SP.
<b>SHADE TREES</b>							
ABS	2	Acer buergerianum 'Streetwise'	Trident Maple	2½ -3'		B&B	
GTS	2	Gleditsia triacanthos v. inermis 'Shademaster'	Shademaster Honeylocust	2½ -3'		B&B	
<b>EVERGREEN &amp; DECIDUOUS CONIFER TREES</b>							
TOE	12	Thuja occidentalis 'Emerald'	Emerald Arborvitae		5-6'	Cont.	
TON	2	Thuja occidentalis 'Nigra'	Dark American Arborvitae		5-6'	Cont.	
<b>ORNAMENTAL TREES</b>							
CFA	2	Cornus florida 'Appalachian Spring'	Appalachian Spring Dogwood		6-7'	B&B	
HTR	2	Halesia tetraptera v. rosea	Pink Carolina Silverbell		7-8'	Cont.	
LIB	3	Lagerstroemia indica 'Biloxi'	Biloxi Crape Myrtle		5-6'	Cont.	
LIT	2	Lagerstroemia indica 'Tuskegee'	Tuskegee Crape Myrtle		5-6'	Cont.	
MDA	11	Magnolia x 'Daybreak'	Daybreak Magnolia		7-8'	B&B	
SRI	3	Syringa reticulata 'Ivory Silk'	Ivory Silk Tree Lilac		7-8'	B&B	
<b>DECIDUOUS SHRUBS</b>							
AEG	53	Abelia x 'Edward Goucher'	Edward Goucher Abelia		24-30"	Cont.	36
CAR	44	Clethra alnifolia 'Ruby Spice'	Ruby Spice Summersweet		30-36"	Cont.	48
FVK	9	Forsythia veridissima 'Kumson'	Kumson Forsythia		24-30"	Cont.	60
HIA	4	Hamamelis x intermedia 'Arnold Promise'	Arnold Promise Witchhazel		30-36"	B&B	60
HSB	3	Hibiscus syriacus 'Blue Satin'	Blue Satin Althea		3-4'	Cont.	72
IVL	53	Itea virginica 'Little Henry'	Little Henry Sweetspire		24-30"	Cont.	48
SNS	13	Spiraea nipponica 'Snowmound'	Snowmound Spirea		24-30"	Cont.	36
SPM	15	Syringa patula 'Miss Kim'	Miss Kim Lilac		3-4'	Cont.	60
VCA	9	Viburnum carlesii	Koreanspice Viburnum		30-36"	Cont.	60
VDR	37	Viburnum dentatum 'Ralph Senior'	Autumn Jazz Viburnum		30-36"	Cont.	60
<b>EVERGREEN SHRUBS</b>							
ICH	41	Ilex crenata 'Helleri'	Helleri Japanese Holly		18-24"	Cont.	36
<b>GROUNDCOVERS &amp; HERBACEOUS PERENNIALS</b>							
ANW	120	Aster novi-belgii 'Winston Churchill'	Winston Churchill Aster			#1 Cont.	18
CPL	355	Cerastigma plumbaginoides	Leadwort			#1 cont.	12
GMI	90	Geranium macrorrhizum 'Ingwersen's Variety'	Ingwersen's Variety Geranium			#1 Cont.	18
GSG	155	Geranium sanguineum 'Glenluce'	Glenluce Bloody Cranesbill			#1 Cont.	18
HCA	116	Hypericum calycinum	St. Johns Wort			#2 Cont.	24
LMB	795	Liriope muscari 'Big Blue'	Big Blue Lilyturf			4" Pots	12

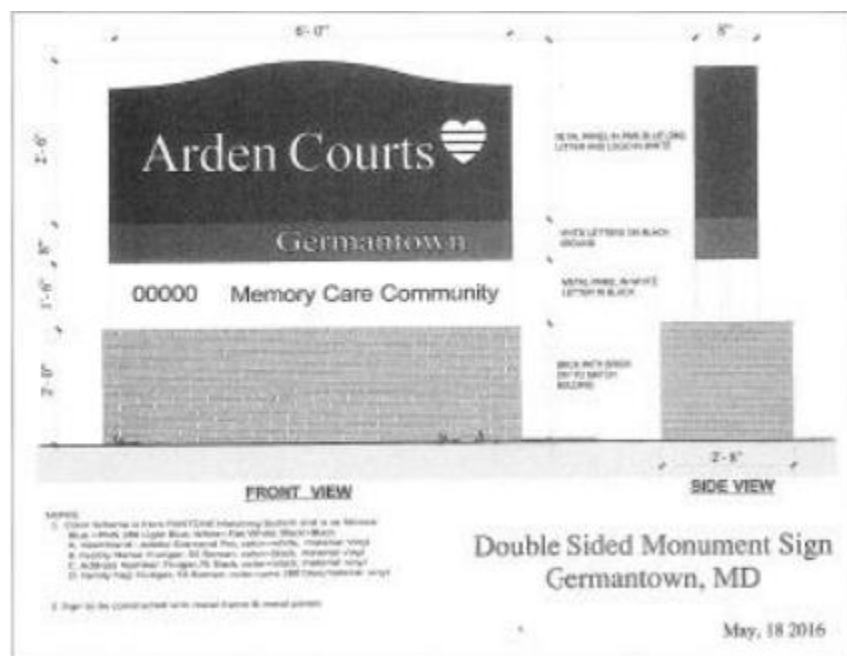
**Landscape Plan Plant List  
Sheet C-4.3  
Exhibit 72(d)**

The Applicant proposes to use full cut-off exterior lighting fixtures to minimize glare to surrounding properties. The Applicant's Site Lighting Analysis Plan (Exhibit 72(e)) shows that illumination will be 0.0 footcandles along the all property lines with the exception of a small area along the southern property line near driveway loop. Illumination along the property line in that area will be 0.1 footcandles.

Mr. Dokken, the Applicant's expert in architecture, testified that the proposed LED bulbs produce less intense lighting and reduce glare. Arden Courts also proposes exterior pole lights that are only 16-feet tall to further reduce glare. He opined that the lower height of the light poles, the LED lights, the smaller parking area, and the cut-off fixtures will be compatible with residential character of development to the south and east of the property. T. 148-150. In its post-hearing submission, the Applicant states, "At its November 29<sup>th</sup> meeting with its neighbors, the Applicant agreed that all parking lot light fixtures will include accessories (e.g., full cut-off shields) to make them 'dark sky/neighbor friendly.'" The Applicant revised its lighting plan to note this. Exhibit 72(f).

A major issue between the parties remains whether the Applicant is able to install motion sensor lighting in the parking area. This is discussed in Part III.A.4 of this Report.

The Applicant proposes one 6-foot, 8-inch high sign consisting of 29 square feet at the driveway entrance along Liberty Mill Road. A graphic of the proposed sign, from the Staff Report, is shown below (Exhibit 44, p. 23):



At the request of Messrs. Shukla and Jacob, the Applicant has agreed to provide a sign of less than 2 square feet near the entrance of the parking lot stating that the lot is restricted to residents, visitors and Staff of the facility. Exhibit 72, p. 4.

### **3. Operations**

Mr. Palmer and Ms. Anita Irvin, manager of the Fair Oaks facility, described the operations of the proposed facility. Employees arrive in generally in three shifts: Shift 1 is from 7:00 a.m. to 3:00 p.m., Shift 2 runs from 3:00 p.m. to 11:00 p.m., and Shift 3 begins at 11:00 p.m. and goes to 7:00 a.m.<sup>4</sup> 11/14/16 T. The peak need for parking is around 3:00 p.m., when Shift 1 leaves and Shift 2 arrives. Based on the operations of their 51 other facilities and a shift overlap of approximately 30 employees, they have targeted parking capacity in the mid-forties. T. 24-25.

Ms. Irvin testified that the facility offers a number of therapy programs that generally take place within the community's center. They also have social and physical activities, in "engagement stations" throughout the building core. She testified that food deliveries occur once a week and trash pick-ups occur twice a week. They set delivery times independently in each facility based on what has the least impact on the surrounding area. She felt that the best time for trash pick-up is generally late morning, possibly between 10:00 a.m. and 12:00 p.m. Visiting hours from 9:00 a.m. to 10:00 p.m., but these are flexible. An aggressive estimate of the number of moves in and out of the facility is approximately 2 – 3 residents per month. T. 43-57.

### **4. Noise**

Technical Staff required the Applicant to conduct a Phase I Noise Study because of the site's proximity to Dawson's Farm Road. Exhibit 40(a). The study measures whether interior sound levels that residents will experience in their units will meet guidelines set by the Planning

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<sup>4</sup> These are described in more detail in Part III.A.2 of this Report, relating to traffic from the facility.

Board. If they do not, sound attenuating materials may be required to reduce noise levels within the units. The guidelines set a goal of 60 dBA for residential interiors in suburban areas of the County. Exhibit 40(a), p. 4. The Applicant's Phase I study concluded that decibel levels along the frontage of Dawson's Farm Road and small portions of the side facades would be 60-63 dBA. Mr. Dokken opined at the public hearing that normal construction materials would bring internal sound levels within the guideline limits without requiring additional or specialty sound attenuation materials. T. 150-151.

Mr. Dokken also testified that residents of the houses south of the property would not hear the generator inside their homes. In his opinion, it would be hard to hear even if they were outside because the generator is within a casing that muffles its noise. The generator is within a larger enclosure, which dissipates noise levels. In his opinion, any noise that individuals would hear from the generator would be more like background or "white" noise. T. 152-153.

At Mr. Shukla's request, the Hearing Examiner asked the Applicant to provide information on the muffler to be used on the generator to mitigate sound from the generator exhaust. The Applicant's post-hearing submission stated that the generator proposed will be equipped with a "hospital grade" muffler in a sound attenuation enclosure. According to the Applicant, this would bring night-time sound levels below 55 dBA, the maximum levels permitted by the Code, at both Mr. Shukla's and Mr. Jacob's properties. Exhibit 74. Messrs. Shukla and Jacobs disagree with this assessment, as set forth in Part II.E.

#### **D. Environmental Issues**

Staff advises that there is a small area of stream valley buffer in the southeast corner of the site due to an off-site stream. Exhibit 44, p. 12. No forest exists on the site. The development will require .56 acres of afforestation. Approximately 0.07 acres of afforestation will be take place

on-site within the stream valley buffer. The balance of the required afforestation (i.e., .49 acres) will be met by purchasing credits in an off-site forest mitigation bank. Staff states, “[A]lthough the 0.07-acre afforestation planting is smaller than the minimum size to be considered forest, this area is immediately adjacent to off-site forest in a SVB [stream valley buffer] protected in a Category I Conservation Easement and thereby increases the overall size of protected forest in the SVB.” Exhibit 44, p. 12. The Planning Board approved the Applicant’s PFCP on November 10, 2016. Exhibits 51, 58(b).

### **E. Community Response**

Staff summarized the community concerns presented to the Planning Board as follows (Exhibit 44, p. 13):

Although not required by the Zoning Ordinance, the Applicant conducted a pre-submission community meeting with the neighborhood on May 16, 2016, with the Principal of Germantown Element School on June 3, 2016, and with two representatives with Montgomery County Public Schools on June 14, 2016. Additionally, the Applicant held a meeting with the Germantown Alliance on September 22, 2016. Concerns from the above meetings are summarized below:

- Traffic generated by the Project, particularly whether it would interfere with the start and dismissal times at Germantown Elementary School.
- Safety of children walking to school during construction of the Project.
- Delivery traffic, noise, lighting and compatibility with the neighborhood.
- Why the access to the Property could not be from Dawson Farm Road instead of Liberty Mill Road.
- Concern for the Dawn Redwood tree near the existing house.

Mr. Shukla and Mr. Jacob, whose lots abut the subject site’s southern property line (Lots 360 and 361 shown on the conditional use site plan (Exhibit 72(b))), appeared at the public hearing to express their concerns. Mr. Shukla questioned whether some type of fence could be placed either at the looped driveway or otherwise, that would prevent individuals from traversing subject property to access his property. T. 212. He also had concerns about potential disruption of his day-to-day life due to noise (particularly from the generator), light pollution, and traffic. Both he

and Mr. Jacob were concerned that stormwater would overflow the existing channel between their property and the subject property and cause flooding. They would prefer to have the storm drain outfall east of their properties, and requested that the Applicant explore this possibility. T. 212-215.

Mr. Jacob requested information regarding the muffler for the generator. He testified that higher quality mufflers can do much more than standard mufflers to mitigate noise levels. In their post-hearing submission, Mr. Shukla and Mr. Jacob requested that the Applicant provide a “Level 3” muffler, rather than the Level 2 muffler proposed by the Applicant. Exhibit 74(a), p. 2. They also requested that the Applicant provide motion-sensor exterior lighting in the parking area. *Id.*

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific to a particular type of use, as set forth in Article 59.3 of the Zoning Ordinance, and general (*i.e.*, applicable to all conditional uses), as set forth in Division 59.7.3 of the Zoning Ordinance. The specific standards applied in this case are those for a residential care facility for more than 16 persons. *Montgomery County Zoning Ordinance*, §59.3.3.2.E.2.c.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (*Zoning Ordinance*, §7.1.1.), the Hearing Examiner concludes that the conditional use proposed in this application, with the conditions imposed in Part IV of this Report and Decision, would satisfy all of the specific and general requirements for the use.

#### **A. Necessary Findings (Section 59.7.3.1.E)**

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E. of the Zoning Ordinance. Standards pertinent to this approval, and the Hearing



Examiner's findings for each standard, are set forth below.<sup>5</sup> The major topics of discussion are further divided under the following headings:

1. Substantial Conformance with the Master Plan;
2. Adequate Public Services and Facilities;
3. No Undue Harm from Non-Inherent Adverse Effects; and
4. Compatibility with the Neighborhood

***E. Necessary Findings***

***1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:***

***a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;***

Conclusion: No previous approvals for this site exist. Exhibit 44, p. 14.

***b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;***<sup>6</sup>

Conclusion: This subsection requires an analysis of the development standards of the R-200 Zone contained in Article 59-4; the use standards for a residential care facility for more than 16 persons contained in Article 59-3; and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds that the application satisfies the requirements of Articles 59-3, 59-4 and 59-6.

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<sup>5</sup> Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

<sup>6</sup> The underlined language was added by the Council when the 2014 Zoning Ordinance was amended effective December 25, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015). The Hearing Examiner advised the parties of this amendment to the Zoning Ordinance and that the changed language would apply to this case. He also gave the parties an opportunity to comment. Tr. 12/3/15 12-13; Tr. 12/7/15 9. To the recollection of the Hearing Examiner, no party objected to applying the amended Zoning Ordinance language to this case.

### **1. Substantial Conformance with the Master Plan**

***c. substantially conforms with the recommendations of the applicable master plan;***

Conclusion: The property lies within the geographic area covered by the *1989 Germantown Master Plan* (Master Plan or Plan). The property is located within an area designated by the Plan as “Clopper Village CL-2 Analysis Area,” which consists of approximately 7 acres. *Plan*, p. 61.

The Plan makes the following recommendation for the area (*Plan*, p. 63):

It is zoned R-200 in conformance with the recommendation for residential development at 2 units per acre in the *1974 Master Plan*. Currently it is occupied by the Germantown Post Office and a single-family detached residence. The United States Postal Service leases the post office site and is in the process of purchasing another site for an enlarged postal facility. This Master Plan recommends that this area retain its R-200 zoning.

Because of its location in a residential area and adjacent to an arterial road it would be suitable for a child or elderly day-care center, religious facility or other similar use. The existing post office site and building might well be able to be converted into a child day-care center.

The property is not suitable for special exception uses that are not compatible with the existing single-family detached character of this area. Retail or similar uses should be located at other, more appropriate locations.

The Plan also calls for an increase in housing diversity in Clopper Village generally, and specifically identifies a need for elderly housing in the Germantown area. *Plan*, pp. 58, 141.

Staff found that the proposed use conformed to the Master Plan because the use is similar to an elderly day-care and, as proposed, is compatible with the residential character of the neighborhood. The Applicant’s expert in land planning, Mr. Donnelly, opined to the same effect. T. 98. Staff further determined that the use addressed the need for elderly housing identified in the Plan.

The Hearing Examiner agrees with Staff and the Applicant that the proposed use substantially conforms to the Master Plan. It fulfills a need for elderly housing identified in the

plan and is quite similar to the uses recommended by the Plan for the CL-2 Analysis Area. The Hearing Examiner further agrees that the facility is compatible with surrounding residential uses, as set forth in detail in Part III.A.4 of this Report.

***d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;***

Conclusion: This provision is a mix of Master Plan analysis and compatibility considerations. The Master Plan issues have been discussed in the preceding section. Compatibility is a question that crosses a number of topics, including the nature of the surrounding uses; any potential adverse impacts; the design of the proposed building, including its height, density and architecture; traffic generation; and other issues discussed in other sections below. The compatibility of the proposed development is discussed in Part III.A.4 of this Report.

In order to determine the compatibility of the proposed use, however, the Hearing Examiner must first define the character of the neighborhood to assess whether the impact from this use will adversely affect or alter that character. The Hearing Examiner does so here.

The character of the surrounding area is primarily residential, consisting of single-family attached and detached homes. The Hearing Examiner finds that the property lies between residential uses to the east and south and separates these from institutional uses (the former post office and the Germantown Elementary School) immediately to the west of the subject property.

***e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;***

Conclusion: Technical Staff reports that no conditional uses currently exist within the defined area. Although a conditional use for a child day care was previously approved, it was never implemented. Exhibit 44, p. 5.

The Hearing Examiner finds that the addition of a single conditional use to the surrounding area will not significantly alter the predominantly residential character of the neighborhood. As stated previously, the Hearing Examiner finds that the proposed development complies with the Master Plan. The site design, architecture, and landscaping have been used to make it compatible with the surrounding residences, as detailed in Part III.A.4 of this Report.

## **2. Adequate Public Services and Facilities**

*f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:*

*i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or*

*ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and*

Conclusion: Staff advises that the property will need to be subdivided. Therefore, the Planning Board will perform a detailed analysis of whether public facilities are adequate during its review

of the preliminary plan. Nevertheless, Staff and the Applicant provided a preliminary assessment of whether public facilities will be adequate to serve the use.

**a. Local Area Transportation Review and Transportation Policy Area Review**

The Planning Board's Guidelines (Guidelines) for Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR), adopted January 24, 2013, in large part govern whether transportation facilities are adequate to serve the use.

The LATR Guidelines are designed to evaluate the adequacy of the local road network by measuring congestion at roadway intersections based on critical lane volume (CLV) and volume to capacity ratio (v/c) during morning and evening weekday peak hours. LATR projects the impact of trips to be generated by the proposed development, taking into account existing developments and developments that are approved, but not yet built. Applications that are expected to generate fewer than 30 trips are exempt from LATR review, but must submit a "Traffic Exemption Statement" to demonstrate that the number generated by the proposal will generate fewer than 30 trips.

The Applicant's expert in transportation planning, Ms. Nancy Randall, testified that the facility is exempt from LATR tests because it will generate fewer than 30 weekday peak hour trips. Her Exemption Statement utilizes trip generation rates from the International Transportation Engineer's (ITE) Manual. These rates are higher than the rates adopted by the Montgomery County Planning Board. The ITE Manual rates are based on empirical studies of trips associated with assisted living facilities and include trips from all sources, such as staff, visitors, deliveries, etc. Based on these rates, the facility is expected to generate a total of 9 trips in the weekday morning peak hour and 14 trips in the evening peak hour. Exhibit 42(a)(i).

While the LATR impact qualifies for an exemption, Ms. Randall performed additional analysis to determine whether traffic from the facility would adversely affect traffic on Liberty Mill Road and Dawson Farm Road because of its proximity to the elementary school. Because Staff deemed that the site's location across from the elementary school is a non-inherent site characteristic, the results of her operational analysis are discussed in Part III.A.3 of this Report. The Hearing Examiner finds from the uncontroverted evidence and testimony in the record that the application is exempt from LATR review.

Transportation Policy Area Review, or TPAR, tests the capacity of roads and transit in a larger geographic area than local intersections. If a particular geographic "policy" area is inadequate in either road or transit capacity, the Applicant must pay an additional transportation impact tax. Staff recommended the following condition, which the Hearing Examiner includes in Part IV of this Report:

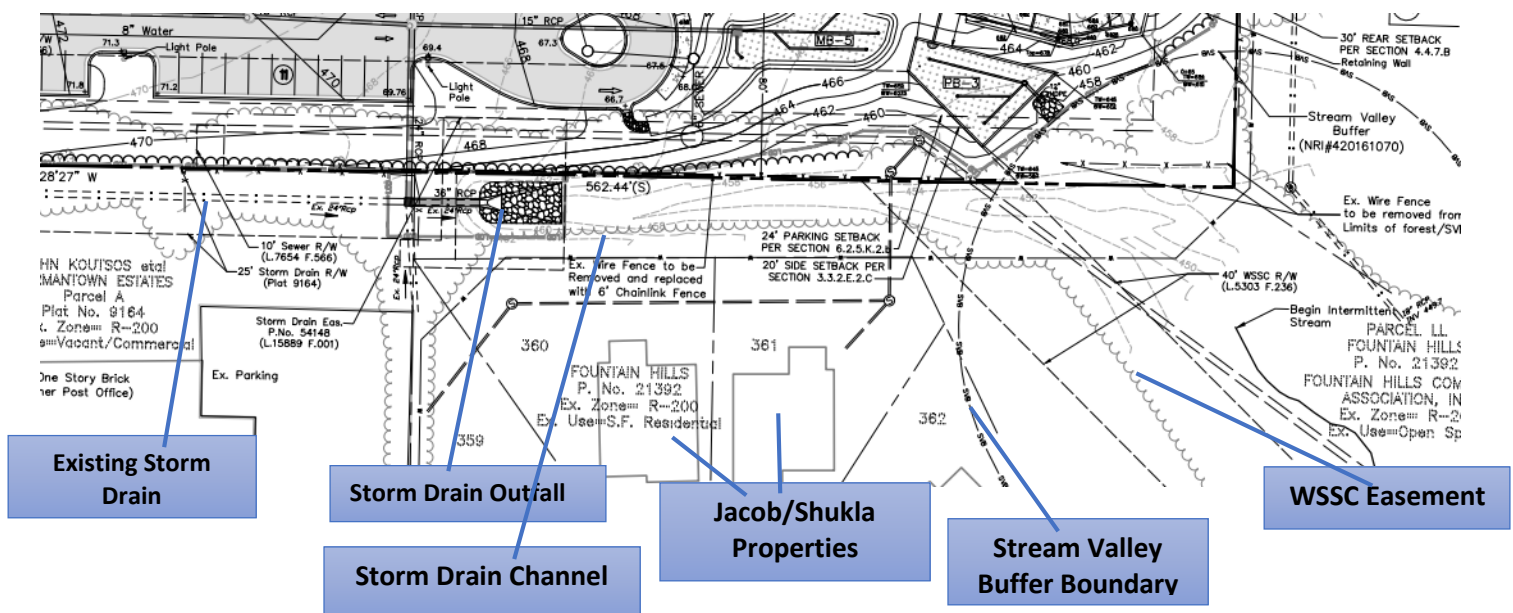
The Applicant must satisfy the applicable transportation "policy area review" test at the time of preliminary plan review.

#### **b. Other Public Facilities**

The adequacy of other public facilities, including schools, police and fire protection, water, sanitary sewer and storm drainage to serve the proposed facility, will also be evaluated in detail at the time of preliminary plan but may reviewed on a preliminary basis here. Evaluation of public facilities is controlled by Subdivision Staging Policy approved by the County Council. The 2012-2016 Subdivision Staging Policy provides, at p. 21, that we ". . . must consider the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated." Exhibit 66.

### 1. Stormwater Management and Storm Drain Facilities

A major issue raised in this case is whether storm drainage will be adequate to serve the use. The Applicant's expert in civil engineering, Mr. Stephen Crum, described the existing storm drain system. There are two separate systems, one to the east of the property, which was constructed in conjunction with Dawson's Farm Road, and a publically maintained system that runs from Liberty Mill Road along the southern property boundary. The system along the southern property line runs through an easement in the former post office site that outfalls to an open channel behind the Shukla/Jacob properties. The channel then feeds into the stream associated with the stream valley buffer southeast of the site. T. 125-126. Most of the impervious surfaces proposed will drain into this system. The Applicant will upgrade the system by increasing the size of the pipe from 24-inches to 36-inches and increasing energy dissipation with rip-rap at the outfall. T. 126. A detail of the conditional use site plan (Exhibit 72(b), below), shows the southern storm drain system:



The Montgomery County Department of Permitting Services (DPS) has reviewed and approved a preliminary stormwater concept plan for the development. Mr. Crum testified that the

stormwater concept proposed will meet all State standards for stormwater management through environmental site design (ESD) facilities. State stormwater standards require them to design for a 10-year storm, or 1 inch of run-off. The first inch is treated on-site with any overflow going to the storm drain system. The ESD facilities are primarily micro bio-retention facilities with some pervious pavement. Under drains from the ESD facilities will feed in to the main storm drain system along the southern property boundary. T. 127-128.

Mr. Shukla and Mr. Jacob ask that the storm drain outfall be moved east of their properties. Mr. Shukla testified that he had seen the storm drain channel behind his house flooded: "...probably on several occasions we have seen the channel pretty close to its capacity. I would say maybe half a foot at most to a foot...below the channel." T. 214. The Applicant's expert in civil engineering, however, pointed out that moving the outfall further east could conflict with both the stream valley and the WSSC easement. He also testified that over 20 acres drain to this system, of which the proposed use is only a small portion. He opined that even a 10-year storm would not come close to the top of the channel's banks. T. 137. At the public hearing, Mr. Donnelly was unsure whether moving the outfall could be accomplished because it would have to be located in property owned by the homeowner's association and Arden Courts would have to receive permission from Montgomery County to extend the system. T. 246-247.

Because of the concerns raised at the hearing, the Hearing Examiner requested Staff to comment on the questions raised by Mr. Shukla. DPS, through Staff, reviewed the proposed stormwater management concept and found no need to treat for larger storm events because "offsite conveyance appeared adequate." Exhibit 66.

The Hearing Examiner concludes that the Applicant has met its burden to show that stormwater management will be adequate for the site, *at this stage of the process*. The



determination of adequacy is vested in this case in the Planning Board during preliminary plan review. The only arguable basis for the Hearing Examiner to review stormwater at this stage would be under the requirements that the use be compatible with the neighborhood or if storm drainage would cause “undue harm” to the surrounding community because of a non-inherent adverse impact. *See, Zoning Ordinance*, §§59-7.3.1.E.1.g (below), 59-7.3.1.E.4. The only non-inherent adverse characteristic that has been identified in this case is the property’s location next to the school, which is unrelated to the stormwater adjacent to the Shukla/Jacob properties. The Applicant has produced expert testimony from a civil engineer that the system will meet all State standards and the stormwater management concept plan has been approved by DPS. Exhibit 18. This is bolstered by DPS’ independent comments that the channel will adequately handle stormwater from the site. The only evidence that there is the potential for flooding is Mr. Shukla’s somewhat anecdotal testimony that he has seen the channel fill one-half foot to a foot below its capacity on several occasions. The weight of the testimony in this case falls in favor of the Applicant, particularly as this issue will be reviewed again in more detail at the time of preliminary plan.

Because this issue has been deferred to preliminary plan approval, Mr. Jacob and Mr. Shukla request that they “be provided adequate notice so we can participate during such approval process.” Exhibit 74, p. 4. The notice required for a preliminary plan application is spelled out in the Planning Board’s *Approved and Adopted Manual for Development Review Procedures (2007)* (Manual), which is available from the Planning Board’s website at: [http://www.montgomeryplanning.org/development/forms/Manual\\_of\\_Development\\_Review\\_Procedures.pdf](http://www.montgomeryplanning.org/development/forms/Manual_of_Development_Review_Procedures.pdf). Section 4.D of the Manual requires the Applicant to send written notice to adjoining property owners, like Mr. Shukla and Mr. Jacob, of three events: (1) the pre-submission

community meeting, (2) the filing of the application, and (3) the Planning Board hearing. It would appear that these procedures address Mr. Shukla's and Mr. Jacob's concerns, and the Hearing Examiner recommends they familiarize themselves with these procedures. Nevertheless, out of an abundance of caution, the Hearing Examiner will independently require the Applicant to provide Mr. Shukla and Mr. Jacob with written notice of the pre-submission community meeting, the Planning Board's acceptance of the application, and the Planning Board hearing within the time frames set in the Manual.

## *2. Other Public Facilities.*

Mr. Crum testified that both public water and sewer were available to the property. T. 124-125. Mr. Donnelly testified that there are adequate police and fire services to serve the use. T. 102. These will be addressed in further detail during review of the preliminary plan.

## **3. No Undue Harm from Non-Inherent Adverse Effects**

*g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:*

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;*
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or*
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.*

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use on nearby properties and the general neighborhood. Inherent adverse effects are "adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations." *Zoning Ordinance*, §1.4.2. Inherent adverse effects, alone, are not a sufficient basis for denial of

a conditional use. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* Non-inherent adverse effects are a sufficient basis to deny a conditional use, alone or in combination with inherent effects, if the adverse effect causes “undue” harm to the surrounding neighborhood.

Technical Staff listed the following physical and operational characteristics that are necessarily associated with (*i.e.*, inherent in) a residential care facility for over 16 persons (Exhibit 44, p. 25):

- 1) Buildings and related outdoor recreational areas or facilities;
- 2) Parking facilities;
- 3) Lighting;
- 4) Vehicular trips to and from the site by employees, visitors, residents, delivery vehicles and waste removal;
- 5) Noise generated by equipment for the facility and by occasional outdoor activities of residents and their visitors; and
- 6) Driveway impacts.

Staff concluded that the property has one non-inherent site characteristic - its proximity to Germantown Elementary School. Staff concluded that this non-inherent characteristic did not warrant denial of the use because the proposed care facility had no adverse impact on school operations. Staff stated (Exhibit 44, pp. 25-26):

The primary concerns raised during community meetings and by the Principal of the school relate to traffic and potential interference of trips to and from the Project with the school’s start and dismissal times. Shift times for the facility’s staff will not overlap with the schools start and dismissal times. The drop-off for the school start time of 9:25 a.m. typically runs from 8:50 to 9:25 am, and cars begin lining up for pick-up at 3:45 p.m., typically ends at 4:10 pm. The Project’s morning shift change occurs at 7 am, and the afternoon shift change occurs at 3:00 p.m., both times outside of the school’s drop-off and pick-up times. The school’s Principal also expressed concern regarding the safety of children walking to school during construction of the Project. Safety concerns during construction of the facility will be reviewed and addressed as part of the permitting process prior to construction on the Site. There is no expected undue harm to the neighborhood either as a result

of any non-inherent adverse effect, or a combination of inherent or non-inherent adverse effects.

Ms. Randall performed an operational analysis of traffic from both facilities to determine whether the proposed development would adversely affect the school. Using the LATR methodology, she found that the intersection of Dawson Farm Road and Liberty Mill Road operated at a CLV of well under 1,000. The maximum permitted in the area is 1,450 CLV. T. 161-163.

Ms. Randall testified that her operational analysis went beyond just applying the trip generation rates to calculate CLV volumes at the intersection. It was also designed to test whether the peak traffic from the assisted living facility would create operational delays at the intersection or queues that might block the driveways to the school or the facility. T. 163. The analysis accomplished this by applying the peak generation rate from the facility to the intersection at two different times: (1) the “street peak” of traffic (weekdays between 7:30 a.m. and 8:30 a.m. and 4:30 p.m. and 5:30 p.m.) and (2) the “school peak” traffic volume, which is 9:25 a.m. (when the school opens) and 3:50 p.m. (when it dismisses.) T. 165.

Ms. Randall testified that the results of the analysis showed that at no time did the combination of peak traffic from the assisted living facility and the street peak or school peak generate a queue of more than one car. She stated that there is sufficient room at the intersection for four cars to queue. She opined that her analysis looked at a “worst case” scenario because the peak school times and peak time for the assisted living facility do not overlap. T. 167. Even if this “worst case” scenario occurred, there would be minimal delays at the intersection of Liberty Mill Road and Dawson Farm Road. Nor would queues block any access to any of the facilities. Further, in response to a request from the Hearing Examiner, the Applicant has proposed a condition designed to ensure that the “worst case” scenario does not occur in the future.

Ms. Randall described the employee shifts in detail. She used these to determine the peak traffic and parking periods for the facility. Shift 1 will have 20-21 people. A cook will arrive at approximately 6:30 a.m. and will leave at varied hours. Eight caregivers and one nurse will arrive at 8:00 a.m. and leave at 3:00 p.m. Six coordinators and 4 administrative staff will arrive at staggered times between 7:30 a.m. and 9:00 a.m. They will depart at staggered times between 4:30 p.m. and 6:00 p.m. Shift 2 will have 5 caregivers and 1 nurse arriving at 3:00 p.m. and leaving at 11:00 p.m. Three to 4 caregivers work from 4:00 p.m. to 8:00 p.m. to help with dinner. Shift 3, which will have 5 caregivers and one nurse, will arrive at 11:00 p.m. and leave at 7:00 a.m. In her opinion, the largest peak traffic (and demand for parking spaces) will occur around 3:00 p.m., when Shift 1 departs and Shift 2 employees arrive. T. 172-176. The facility will need 25 spaces at 3:00 p.m. and an additional 3-4 spaces at 4:00 p.m. The demand for parking spaces will reduce after 4:00 p.m. when the administrative staff begins to leave. T. 177. She pointed out that the number of staff doesn't necessarily equate to the number of trips, as people don't always arrive and depart at exactly the same times. T. 182. In her opinion, it is unnecessary to impose a condition requiring separation between the school and facility peaks because they are unlikely to change.

At the Hearing Examiner's request, the Applicant proposed the following condition to ensure that peak hour traffic from the school and the assisted living facility do not overlap (Exhibit 72, p. 5):

Employee arrival and departure times must be staggered so that fewer than 30 employees arrive and depart the site within any one hour, and that the primary shift changes to not occur during the 45 minutes prior to and 15 minutes following the established Germantown Elementary School start and dismissal times.

Based on the testimony and evidence in the record, the Hearing Examiner agrees that the non-inherent site characteristic (i.e., proximity to the elementary school) does not cause a non-

inherent adverse impact that would justify denial of the use, and the proposed condition adequately addresses any future changes in the school schedule.

Having determined that the non-inherent site condition in this case does not result in an adverse impact on the neighborhood, the Hearing Examiner does not address the evidence and testimony regarding whether this facility will cause “undue harm” to neighboring property values.<sup>7</sup>

#### **4. Compatibility with the Neighborhood**

***2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.***

Conclusion: Zoning Ordinance §59-7.3.1.E.2 requires an examination of the compatibility of the use with the character of the residential neighborhood in which it is located. This question is similar to the one raised by Zoning Ordinance §59-7.3.1.E.1.d. above, which asked whether the proposed use will be harmonious with the neighborhood or would alter its character.

Several witnesses testified that the proposed development will not alter the existing residential character of the neighborhood due to its site design, architecture, and landscaping. Mr. Donnelly opined that the use is an appropriate transition between the single-family attached and detached homes to the east and south of the property and the institutional/public uses to the west, including the former post office and school. He pointed out that the parking area and the building have been located as far from the homes along the southeast property line as possible. T. 80. Mr. Dokken testified that the four wings separated by courtyards have broken up the larger mass of the building. Roof elements have been used to break up the roofline. Other design elements, such as a front porch feature, window shutters, and lap siding, create a residential feel. T. 145-146. Landscaping for the property exceeds what is required by the Zoning Ordinance.

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<sup>7</sup> The “undue harm” analysis applies only when there is a non-inherent characteristic of the use that causes an adverse impact on the surrounding area. *Zoning Ordinance*, 7.3.1.E.1.g.

Staff concluded that the proposed development was compatible with the residential character of the area for the reasons already described. Staff also pointed out (Exhibit 44, p. 26):

Noises will be minimized by the building design, building placement and screening. Loading and waste collection will occur on the front and west sides of the facility, approximately 180 feet away from the nearest residential property to the south. Two of the outdoor areas for residents and visitors are semi-enclosed by the building design, and a third outdoor area is located between the building and Dawson Farm Road.

The parties disagree on several issues relating to the compatibility of the property with the surrounding area, particularly its impact on the Shukla/Jacob properties. The Applicant has demonstrated that illumination from exterior lighting will be within the Zoning Ordinance requirements at the property lines. Light poles will be only 16-feet in height and will use LED lights in full cut-off fixtures. At the public hearing, Messrs. Shukla and Jacob asked the Applicant to explore sensor-dimming lights in the parking area. The Applicant did so and determined that these were infeasible (Exhibit 72, p. 4):

....the Applicant's lighting consultant has evaluated this proposal further and has determined that it is not possible to field deactivate the dimming/motion detection function of the pole light fixture and later reactivate it. The Applicant was fully prepared to agree to what was discussed at the November 29<sup>th</sup> meeting, but has unfortunately determined this to be technologically infeasible. Therefore, because there is no ability to field deactivate the dimming/motion detection function and later reactivate it, the Applicant at this time cannot agree to include motion sensor capability on the pole lights, when the effects of this on the Project and residents are unknown.

Messrs. Shukla and Jacob remain dissatisfied with the Applicant's response. They submitted excerpts from a catalog containing the lights proposed by the Applicant. The catalog includes a hand-held accessory that may be used to activate and deactivate motion sensor lights. Messrs. Shukla and Jacob state: "The FSIR-100 accessory is a hand held wireless IR transceiver which can be used to change light fixture/sensor setting parameters, from the ground...[the catalog] clearly indicates...that if the low mode can be set equal to the high mode setting, the light fixtures

sill be prevented from dimming to a lower illumination level, even after not detecting any motion.”

Exhibit 74(a)(iv). The catalog instruction states (Exhibit 74(a)(iv):

The FSIR-100 Wireless IR Configuration Tool is a handheld tool for changing defaults and testifying of WattStopper devices. It provides wireless access to the devices for parameter changes and testing.

\* \* \*

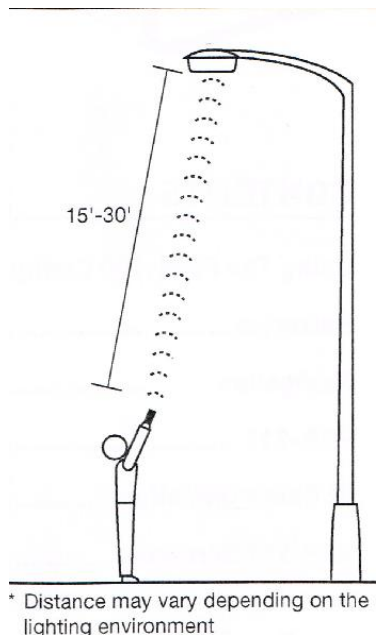
Within a certain mounting height of the sensor, the FSIR-100 allows modification of the system without requiring ladders or tools; simply with the touch of a few buttons.

The catalog (Exhibit 74(a)(iv), under the heading “IR Communication,” further states:

IR communication can be affected by the mounting height of the sensor and high ambient lighting such as direct daylight or electric light such as floodlights, and some halogen fluorescent lamps, LED’s.

When trying to communicate with the device, be sure to be positioned under the sensor without any obstructions. Every time the commissioning tool establishes communication with the device, the controlled load will cycle.

A diagram from the catalog demonstrating the appropriate usage of the accessory is shown below (Exhibit 74):





The Hearing Examiner does not require the Applicant to provide motion sensor exterior lighting for several reasons. First, there is no evidence in this record that the lighting plan presented at the public hearing is incompatible with the neighborhood. The Zoning Ordinance requires illumination at property lines bordering residential properties to be no greater than 0.1 footcandles. The site lighting analysis submitted by the Applicant shows that illumination will actually be 0.0 footcandles along these property lines, except for a very small area near the driveway loop that will be 0.1 footcandles foot-candles. The Applicant has amended its lighting plan to note that it will use “dark sky,” full cut-off fixtures. The Applicant provide expert opinion that the landscaping will be sufficiently tiered to screen the parking area and lighting from views from the Shukla/Jacobs property.

In contrast, Mr. Shukla and Mr. Jacob have offered no concrete evidence that motion sensor lights are needed to maintain residential the character of the surrounding area. The purpose of the limitation of 0.1 footcandles is to eliminate glare on adjoining properties—not to eliminate all views of the lights. There is no expert testimony, or any testimony other than an expressed preference, to indicate that partial views of the lights would impact the residential character of the area.

The Hearing Examiner further finds that the catalog information reinforces the Applicant’s claim that use of the hand-held accessory is infeasible (while not completely impossible) in the sense that it may not be practical. The purpose of the wireless tool is to eliminate the need to actually reach the light fixture to de-active the sensor. The catalog illustration and description demonstrates that it is necessary to have someone physically travel to the parking area to reactivate the lights. Based on the staffing scheduled described, the Hearing Examiner is not assured that the Applicant will have an employee available to monitor and travel to the parking lot to reactivate or

deactivate the lights with a hand-held device. Shift 3, which begins at 11:00 p.m., has only five caregivers and one nurse, all of whom will presumably be taking care of residents.

Further, Mr. Jacob and Mr. Shukla do not address security concerns that could be created with the dimmed lighting. At least one shift, and at some times of the year, both the evening and morning shifts, which change during the dark hours. In addition, visiting hours are not formally restricted. Without more evidence that motion sensors are needed to make the use compatible, Mr. Jacob and Mr. Shukla have failed to prove they should be required.

Another outstanding issue related to compatibility is the type of muffler to be used with the proposed generator. The Applicant estimates that noise levels from the generator (with the muffler it proposes) will be 53.2 dBA at the nearest point of Lot 360 and 51.13 dBA at the nearest point on Lot 361. According to the Applicant, these are 224 feet and 284 feet from the generator, respectively.

Mr. Jacob and Mr. Shukla, however, provide their own sound level formula, and conclude that sound levels at 224 feet to be 58.22 dBA. They do not provide any analysis of sound levels at 284 feet. Exhibit 74, p. 2.

Neither party provides the source of the formulas used to calculate dBA levels at Mr. Shukla's and Mr. Jacob's property lines. Nor was there any expert testimony at the public hearing subject to cross-examination. Written evidence is given less weight than that of expert testimony subject to cross-examination. *See, OZAH Rules of Procedure*, Rule 3.2(d).

Mr. Dokken opined, as an expert, that any noise from the generator would be similar to background or "white" noise that individuals really don't recognize unless they are really listening for it. T. 152-153. As previously indicated, Staff found that the amount of noise to be generated by this facility was inherent to the use. Exhibit 44, p. 26.

The range of noise levels at 224 feet from the generator disputed by the parties is between 53.2 dBA (from the Applicant) and 58.22 dBA (from Messrs. Shukla and Jacob). Mr. Jacob and Mr. Shukla have not been qualified as experts in any field nor is it clear upon what they base their calculations, which have not been subject to cross-examination. The Hearing Examiner does not find any of the evidence complete or persuasive enough to find that the muffler proposed by the Applicant is inadequate or even that the muffler advocated by Mr. Jacob and Mr. Shukla may be installed on the particular generator proposed. As such, they have failed in their burden to prove that the “Level 3” generator should be required. To address their concerns about noise, the Hearing Examiner imposes a condition of approval requiring compliance with the sound levels mandated by the Code, rather than choosing a particular muffler on an incomplete record.

The Applicant and Messrs. Shukla and Jacob also indicate that they have agreed that the Applicant will attempt to install a 6-foot, 6-inch fence along their mutual property line. This stems from Mr. Shukla’s and Mr. Jacob’s concerns related to the security of their properties. They request that the Hearing Examiner “enter this agreement to make sure that the Applicant follows through with the approval requests with M-NCPPC [Maryland-National Capital Park and Planning Commission] and WSSC [Washington Suburban Sanitary Commission] in a timely manner.” They also request a condition of approval requiring the Applicant to provide them with a copy of its request to install the fence to M-NCPPC and WSSC, along with the responses received from those agencies. Finally, they request the opportunity to appear at any hearing regarding those matters. Exhibit 74, p. 4.

The Hearing Examiner will impose a condition requiring the Applicant to provide a copy to the parties of its written request to the WSSC to install the fence, but will not “enter an

agreement” in this decision, require attendance at any hearings, or mandate participation in proceedings with the WSSC.

Private agreements between two parties to a zoning case operate independently of a decision whether to approve a conditional use application. *St. Luke's House, Inc. v. DiGiulian*, 274 Md. 317, 330 (1975)(Private agreements are entirely independent of zoning and have no proper place in proceedings of this character.) The Hearing Examiner’s function is to determine whether or not the application meets the Zoning Ordinance standards for approval, and not to act as leverage in negotiations between the parties without evidence that the actions are needed to meet these standards.

In this case, there is absolutely no probative evidence that the proposed use will adversely affect the security of the Jacob/Shukla properties. The Applicant has voluntarily added the 6-foot, 6-inch chain link fence to the plan. The Zoning Ordinance discourages placement of structures within public easements. *See, Zoning Ordinance*, §59-, “ To satisfy Section [6.2.9](#) [parking lot screening requirements], Division [6.3](#) [open space requirements], and Division [6.5](#), a property owner must not place plant material in any utility, stormwater management, or other easement that may result in removal of the plantings, except as allowed under Section [6.2.9](#), Division [6.3](#), and Division [6.5](#).”

The Hearing Examiner permits the Applicant to show the fence on the proposed plan because it is not *necessary* to satisfy the requirements listed in §59-6.4.3.A.4, which were met without the fence. She finds, however, that the fence is not required for approval of the conditional use because of the lack of probative evidence that security will be impaired. *Miller v. Kiwanis Club of Loch Raven, Inc.*, 29 Md. App. 285, 296 (1975)(without evidence that feared conditions

presently exist, nor indeed that there is more than a possibility (as opposed to probability) that they will ever exist, board cannot deny conditional use.)

To any extent that a condition is necessary to finalize what has been approved in this case, the Hearing Examiner will require the Applicant to reduce its request to the WSSC to install the fence to writing with a copy to all parties. She will also require the Applicant to provide a copy of the written response from WSSC to the parties and to OZAH so that the public will know whether the fence could be installed. Since there's no evidence in the record of WSSC's review procedures (i.e., whether there are any hearings), she does not impose a condition relating to these. The Planning Department has already indicated that it will approve the fence, so the fence need not be subject to its approval.

***3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.***

Conclusion: The application satisfies all specific requirements for the conditional use, and with the conditions imposed to mitigate adverse impacts, meets the standards required for approval.

### **B. Development Standards of the Zone (Article 59-4)**

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the R-200 Zone, contained in Article 59-4 of the Zoning Ordinance.

Conclusion: Staff concluded that the application meets the development standards of the R-200 Zone and included a table comparing the minimum development standards to what is provided on the conditional use site plan. Exhibit 44, p. 24. The Applicant's expert in civil engineering, Mr. Johnson, also testified that the development meets all of the standards of the underlying zone. 10/20/16 T. 45-45.

Based on this evidence, and having no evidence to the contrary, the Hearing Examiner concludes that the use as proposed meets all standards of the R-200 Zone.

**C. Use Standards Specific to a Residential Care Facility (Section 59-3.3.2.E.2.c.)**

The specific use standards for approval of a residential care facility are set out in Section 59-3.3.2.E.2.c.ii of the Zoning Ordinance.

*ii. Where a Residential Care Facility (Over 16 Persons) is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:<sup>8</sup>*

*(a) The facility may provide ancillary services such as transportation, common dining room and kitchen, meeting or activity rooms, convenience commercial area or other services or facilities for the enjoyment, service or care of the residents. Any such service may be restricted by the Hearing Examiner.*

Conclusion: Mr. Palmer testified that the facility would provide ancillary services, including a shuttle bus, a common dining room, activity rooms and other services, such as a fitness center. T. 47-48. Staff did not recommend restricting these activities. Exhibit 44, p. 13. The Hearing Examiner finds no reason in this record to restrict these activities.

*(d) Where facility size is based on the number of beds, not dwelling units, the following lot area is required:*

\* \* \*

*(2) In all other zones, the minimum lot area is 2 acres or the following, whichever is greater:*

\* \* \*

*(i) In RE-2, RE-2C, RE-1, and R-200 Zone: 1,200 square feet per bed;*

Conclusion: The conditional use site consists of 3.09 acres or 134,600.4 square feet. The Applicant proposes 64 beds. Square footage per bed is approximately 2,103 square feet. The application meets this standard.

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<sup>8</sup> The only relevant subsections are Sections 59.3.3.2.E.2.c.ii.(a), (d), (e) and (i). Subsections (b), (c), (f), (g), (h), and (j) are not applicable to the proposed use.

***(e) The minimum side setback is 20 feet.***

Conclusion: Staff advises that the setback from the western property line is 29 feet. Exhibit 44, p. 15. The building is setback 80 feet from the southern property line. The Hearing Examiner concludes that this standard has been met, as did Staff.

***(i) Height, density, coverage, and parking standards must be compatible with surrounding uses; the Hearing Examiner may modify any standards to maximize the compatibility of the building with the residential character of the surrounding neighborhood.***

Conclusion: The Hearing Examiner evaluated compatibility with surrounding uses in her discussion of the compatibility finding required by §59-7.3.1.E.2. That discussion is incorporated herein. As stated there, the Hearing Examiner finds that the proposed use, as represented in the conditional use site plan (Exhibit 72(b)).

**D. General Development Standards (Article 59-6)**

Article 59-6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. Under the amendments to Section 59-7.3.1.E.1.b. of the new Zoning Ordinance, effective December 21, 2015, the requirements of these sections need be satisfied only “to the extent the Hearing Examiner finds necessary to ensure compatibility.”<sup>9</sup> Technical Staff found that the following sections apply to this application: Division 6.2 Parking, Queuing and Loading; Division 6.4. General Landscaping and Outdoor Lighting; Division 6.5. Screening, and Division 6.7. Signs. Exhibit 44, pp. 16-17. This Report analyzes whether the application meets these requirements below.

**1. Parking, Loading and Queuing Standards**

Conclusion: Parking, queuing and loading standards are governed by Division 6.2 of the Zoning

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<sup>9</sup> The 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), was amended effective December 25, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

Ordinance.<sup>10</sup> For residential care facilities, the required number of vehicle parking spaces is based on the number of beds and the maximum number of employees on a shift. Zoning Ordinance §59-6.2.4.B. The applicant must provide 0.25 spaces per bed and 0.50 spaces per employee. Staff advises number of employees is based on the time when the most employees are present. Staff concluded that the facility must provide 32 spaces. Based upon testimony at the public hearing, the Hearing Examiner agrees with Staff. The most employees will be on-site between 3:00 p.m. and 4:00 p.m., when the morning and afternoon shifts change and additional caretakers arrive to help with dinner. Conservatively, that time period could have as many as 30 to 31 employees on site, depending on when employees actually arrive and leave. The minimum required parking for that amount of on-site employees would be 32 spaces (i.e.,  $(64 * .25) + (31 * .5)$ ). As the Applicant will provide 44 spaces, this standard will be met. While no bicycle spaces are required, there will be four of these spaces outside the main entrance. Exhibit 44, p. 17.

Section 6.2.5.K imposes requirements on parking areas that support conditional uses in residential zones, such as this application:

*K. Facilities for Conditional Uses in Residential Detached Zones*  
*Any off-street parking facility for a conditional use that is located in a Residential Detached zone where 3 or more parking spaces are provided must satisfy the following standards:*

*1. Location*

*Each parking facility must be located to maintain a residential character and a pedestrian-friendly street.*

Staff concluded that the plan reviewed by the Planning Board (before landscaping had

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<sup>10</sup> Divisions 6.2.5, 6.2.6, and 6.2.8 govern the design of vehicle parking spaces, bicycle parking spaces and loading areas. Some of the standards have detailed requirements related to the dimensions and configuration of parking and bicycle spaces. Technical Staff did not review all of these standards in its report, however, Mr. Crum testified at the public hearing that all standards applicable to parking and loading have been met. T. 133-134. As there is nothing in the record to the contrary, these sections are not repeated here and the Hearing Examiner finds that these standards have been met.



added to the revised plan submitted after the public hearing) met these requirements (Exhibit 44, p. 17):

Parking is located on the front side of the Property off of Liberty Mill Road, and is oriented opposite the former post office site. A landscaped buffer will provide a natural screen for the two homes located along the southern boundary of the property, minimizing views of the driveway turnaround and loading area.

The Hearing Examiner agrees with Staff that the location of the parking will maintain the residential character of the area because it is located adjacent to the former post office property and away from the nearest residences. Landscaping has been added to that area to enhance screening.

Section 6.2.5.K also imposes special setbacks for surface parking in conditional uses adjacent to properties in residential zones. These are:

2. *Setbacks*

- a. *The minimum rear parking setback equals the minimum rear setback required for the detached house.*
- b. *The minimum side parking setback equals 2 times the minimum side setback required for the detached house.*

Staff concluded that the first setback listed above is not applicable to this application. It also found that conditional use plan met the side parking setback. Exhibit 44, p. 17. The minimum side setback in the R-200 Zone is 12 feet. Therefore, the side parking setback must be 24 feet. Staff advises that the parking area is setback at least 24 feet from the southern property line. Having no evidence to the contrary, the Hearing Examiner finds that these standards have been met. Exhibit 44, pp. 17-18.

Section 59-6.2.8 of the Zoning Ordinance mandates minimum requirements for loading spaces. Staff advised that the property requires one loading space. *Id.* The conditional use site plan shows this loading space on the northern side of the parking area west of the building. Mr.

Crum testified that the loading space meets all other design requirements of the Zoning Ordinance. T. 131-132.

Section 6.2.9.C of the Zoning Ordinance sets minimum landscaping and screening standards for surface parking areas with 10 or more spaces on property that abuts properties in single-family detached zones:

C. Parking Lot Requirements for 10 or More Spaces

1. Landscaped Area

- a. A surface parking lot must have landscaped islands that are a minimum of 100 contiguous square feet each comprising a minimum of 5% of the total area of the surface parking lot. Where possible, any existing tree must be protected and incorporated into the design of the parking lot.
- b. A maximum of 20 parking spaces may be located between islands.
- c. A landscaped area may be used for a stormwater management ESD facility.

2. Tree Canopy

Each parking lot must maintain a minimum tree canopy of 25% coverage at 20 years of growth, as defined by the Planning Board's Trees Technical Manual, as amended.

3. Perimeter Planting

- a. The perimeter planting area for a property that abuts an Agricultural, Rural Residential, or Residential Detached zoned property that is vacant or improved with an agricultural or residential use must:
  - i. be a minimum of 10 feet wide;
  - ii. contain a hedge, fence, or wall a minimum of 6 feet high;
  - iii. have a canopy tree planted every 30 feet on center; and
  - iv. have a minimum of 2 understory trees planted for every canopy tree.

Staff concluded that the previous version of the conditional use plan (i.e., the one reviewed by the Planning Board) met these requirements, as summarized in the following table (*Id.*, p. 20):

	Required/Permitted	Proposed
<b>1. Landscaped Area</b>		
a. Minimum Landscape Island Area	100 SF minimum 5% of total parking lot area	118 SF min. 10% (1,504 SF)
b. Maximum Parking Spaces Between Islands	20 Spaces	12
c. SWM Facility in Landscaped Area	Permitted	None provided
<b>2. Tree Canopy</b>		
a. Minimum Tree Canopy	25% of Parking Area in 20 Years	25.1%
(Parking Area = 17, 241SF 20 – Year Tree Canopy Area	4, 310 SF	4,333 SF
<b>3. Parking Lot Perimeter Planting</b>		
a. Planting Area Abutting a Residential Detached Zoned Property, Improved with a Vacant Commercial Use		
i. Minimum Width	10'	16'
ii. Minimum Fence Height	6'	6'-6"
ii. Canopy Trees	30' o.c. (length = 218.7')	7
iv. Understory Trees	2 per Canopy Tree (14)	15

There is nothing in the record contrary to Staff's determination that the requirements of the applicable sections of Article 6 have been met, particularly as more landscaping has been added southeastern edge of the parking area after Staff's review. Exhibit 78(a). Based on the record before her, the Hearing Examiner finds that the proposed development meets these standards.

## 2. Site Landscaping and Screening

Conclusion: Division 59-6.4 of the Zoning Ordinance sets minimum standards for site landscaping, which are intended to "preserve property values, preserve and strengthen the character of communities, and improve water and air quality." §59-6.4.1. Section 59-5.3.A.1 provides that "*Screening is required along a lot line shared with an abutting property that is vacant or improved with an agricultural or residential use.*" In this case, screening is required along the southern property line, which will abut Mr. Shukla's and Mr. Jacob's homes, and along the eastern property line. Exhibit 43.

The mandatory screening requirements are included in §59-6.5.3.C.7 of the Zoning Ordinance. The Zoning Ordinance gives two options for conditional uses in the R-200 Zone.

Both options require a particular number of shrubs and bushes for every one hundred feet. Option A permits landscaped buffers to be 8-feet wide with a 4-foot wall or fence and mandates the number trees and shrubs that must be planted within the 8-foot wide landscaped strip. Option B does not require a fence, but the buffer must be 12 feet wide, and have a specified number of trees and shrubs for every 100 feet in length.

Staff advises that the conditional use site plan reviewed by the Planning Board meets the minimum screening requirements for Option B along the property's southern and eastern boundaries. Subsequent to the public hearing, the Applicant added additional landscaping to the southeast corner of the parking area. The Hearing Examiner accepts Staff's assessment, as the evidence demonstrates that the landscaping proposed exceeds the minimum requirements of the Zoning Ordinance.

### **3. Outdoor Lighting**

Conclusion: The outdoor lighting proposed for the conditional use was discussed in Part II.C.2. of this Report and Decision. Permissible levels of illumination are capped at 0.5 footcandles along property lines. For conditional uses that abut single-family detached homes, the permissible lighting level is reduced to 0.1 footcandles (Zoning Ordinance, §6.4.4.E):

*Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.*

The proposed fixtures must also meet the design requirements and fixture height limits specified in Zoning Ordinance §59-6.4.4.B.

The Site Lighting Analysis demonstrates that illumination from the property will be 0.0 footcandles around most of the site and will be 0.1 footcandles at a small area south of the looped

driveway. The applicant proposes full cut-off fixtures meeting the requirements of the Zoning Ordinance. Exhibits 72(e) and (f). The Hearing Examiner finds that the lighting proposed meets these requirements of the Zoning Ordinance, as did Planning Staff.

#### **4. Signage**

Division 6.7 of the Zoning Ordinance governs signage for the property. Typically, signs in residential zones are limited to two square feet. *Zoning Ordinance*, §6.7.8.A. Section 6.7.8.B, permits additional sign area for new subdivisions:

##### *B. Additional Sign Area*

##### *1. Subdivision and Multi-Unit Development Location Sign*

*Additional sign area is allowed for a permanent location sign erected at any entrance to a subdivision or Multi-Unit development if the sign is a ground sign or wall sign located at an entrance to the subdivision or building.*

- a. 2 signs are allowed for each entrance.*
- b. The maximum sign area is 40 square feet per sign.*
- c. If the driveway entrance to the subdivision or development is located in the right-of-way, a revocable permit issued jointly by the Sign Review Board and the appropriate transportation jurisdiction must be obtained to erect the sign.*
- d. The maximum height of a sign is 26 feet.*
- e. The sign may be illuminated (see Section 6.7.6.E).*

Conclusion: The signage concept proposed by the Applicant was described and depicted in Part II.C.2 of this Report and Decision. Staff initially advised that the sign will not require a variance because it falls within the standards of the Section 59-6.7.8.B.1 of the Zoning Ordinance (above).

The Hearing Examiner asked the Applicant to provide a legal analysis as to whether the sign proposed requires a variance. Arden Courts replied (Exhibit 72):

We have subsequently reviewed additional residential care facility conditional use applications (also going back in time prior to October 30, 2014, when the 2014 Zoning Ordinance took effect, to when conditional uses were called special exceptions). Based on a review of several cases, it appears that while Technical Staff has generally concluded that a residential care facility is eligible for additional

sign area under Section 59-6.7.8.B.1 of the 2014 Zoning Ordinance...the Montgomery County Department of Permitting Services (“MCDPS”, which has ultimate say over the permissible signage area for a site given that they issue sign permits), has not concurred, opining instead that signage for a residential care facility in a residential zone is limited to two square feet, unless a variance is granted.

Section 59-7.4.4 of the Zoning Ordinance governs sign variances. Sign variances are approved by the Sign Review Board, however, the Hearing Examiner may determine whether the sign is compatible with the surrounding area. Section 59-7.4.4.C.6 states:

The Sign Review Board may approve a variance for a sign on property with a conditional use approval if the Hearing Examiner or Board of Appeals, as applicable, has approved the sign. Nothing in Section 7.4.4 prevents the Sign Review Board from imposing more restrictive conditions than the Hearing Examiner or Board of Appeals, but the Sign Review Board must not approve a sign variance that is less restrictive than any condition set by the Hearing Examiner or Board of Appeals.

The Applicant has provided the following analysis from its architect that the sign proposed is compatible with the surrounding area:

Given that the Project will be set back far from the street and does not face the parking lot entrance, clear identification on the street side will be most important for those visiting for the first time as they approach from either direction along Liberty Mill Road. The proposed sign is in proportionate scale to the length of the subject property’s frontage and appropriately sized to effectively provide sufficient visibility without being excessive. The lettering and address identification are contrasting to assist drivers in readily identifying the entrance to the Project. The contemporary and easily identifiable graphic monument sign is mounted on a brick base that reflects the masonry style of the building façade. The site signage is a design that is complementary with the residential style of the building and surrounding neighborhood.

Mr. Shukla and Mr. Jacob did not have additional comments on the monument sign. The Hearing Examiner finds the proposed location is compatible with the area because it is located on Liberty Mill Road, away from the homes to the north (across Dawson Farm Road), east and south of the property. She agrees with the Applicant’s architect that the larger size of the sign is appropriate to reduce potential conflicts due to the multiple driveways accessing this segment of

Liberty Mill Road, particular those of the school. The Hearing Examiner, therefore, includes a condition of approval requiring the Applicant to obtain a sign permit, and if needed, the requisite variance.

The Hearing Examiner further concludes that the small sign proposed announcing that the use of the parking lot is limited to residents, employees and visitors, is appropriate and will contribute to the compatibility of the use. Because the school is located directly across the street, the smaller sign will mitigate against individuals from the school using the parking lot, particularly during school opening and dismissal times.

#### IV. CONCLUSION AND DECISION

As set forth above, the application meets all the standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance. Based on the foregoing findings and conclusions, the application of Arden Courts of Germantown LLC for a conditional use under Section 59-3.3.2.E.2.c. of the Zoning Ordinance to build and operate a residential care facility for more than 16 persons at 19115 Liberty Mill Road, Germantown, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Applicant shall be bound by the testimony of its witnesses and the representations of its counsel identified in this Report and Decision.
2. Physical improvements to the Subject Property are limited to those shown on the Conditional Use Site Plan (Exhibit 72(b)), Landscape Plan (Exhibit 78(a) and 72(d), and Lighting Plan (Exhibits 72(e) and (f)).
3. The facility may have no more than 64 residents.
4. The living units must not have full kitchens.
5. Employee arrival and departure times must be staggered so that fewer than 30 employees arrive and depart the site within any one hour, and that the primary shift changes do not occur during the 45 minutes prior to and 15 minutes following the established Germantown Elementary School start and dismissal times.

6. The architecture of the building must be consistent with the architectural renderings submitted with the conditional use application (Exhibit 37(d)).
7. The Applicant must operate this facility in accordance with all applicable County noise regulations.
8. The Applicant must provide all parties with a copy of its written request to the WSSC for approval of the fence along the southern property line shown in the approved Landscape Plan (Exhibit 78(a)). If the WSSC does not approve installation of the fence as shown in the Landscape Plan, the Applicant shall file a copy of WSSC's decision with the Office of Zoning and Administrative Hearings for the record of this case and provide a copy to all parties.
9. The Applicant must obtain approval of a Preliminary Plan of Subdivision per Chapter 50 of the Montgomery County Code. Any changes to the approved Conditional Use Site Plan (Exhibit 72(b)) necessitated by approval of the preliminary plan must be filed with OZAH.
10. The Applicant must satisfy the applicable transportation "policy area review" test at the time of preliminary plan review.
11. The Applicant must notify all parties, in writing, of the pre-submission community meeting for the preliminary plan, the Planning Department's acceptance of the preliminary plan application, and the Planning Board hearing following the procedures in Section 4 of the Planning Board's *Manual for Development Review Procedures* (2007).
12. No more than 35 employees may be on-site at any time.
13. The Applicant must satisfy the applicable transportation "policy area review" test at the time of preliminary plan review.
14. The Applicant must dedicate an additional 17-19 feet of right-of-way along Liberty Mill Road at the time of preliminary plan.
15. Prior to the release of Use and Occupancy certificates the Applicant must meet all applicable Federal, State and County certificate, licensure, and regulatory requirements.
16. The Applicant must comply with all conditions of the approved Preliminary Forest Conservation Plan (Exhibit 58(b)).
17. Prior to any land-disturbing activities, the Applicant must receive approval of a Final Forest Conservation Plan by the Montgomery County Planning Board.



18. The Applicant must obtain a sign permit issued by the Department of Permitting Services or the Sign Review Board, as appropriate, and must file a copy of any such sign permit with OZAH. The final design of the proposed sign must be in compliance with the Zoning Ordinance restrictions for signs displayed in a residential zone, or the Applicant must first obtain a sign variance from the Sign Review Board.
19. The Applicant must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements

Issued this 13th day of January, 2017.



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Lynn A. Robeson  
Hearing Examiner

#### NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record or aggrieved party may file a written request to present oral argument before the Board of Appeals, in writing, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's report and decision. Any party of record or aggrieved party may, no later than 5 days after a request for oral argument is filed, file a written opposition or request to participate in oral argument.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59-7.3.1.F.1.c.

Montgomery County Board of Appeals  
100 Maryland Avenue, Room 217  
Rockville, MD 20850  
(240) 777-6600